TAN SRI DATUK PADUKA TING PEK KHIING

v.

DATO' HAMZAH ABDUL MAJID & ANOR

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
ABDUL KADIR SULAIMAN JCA
ABDUL AZIZ MOHAMAD JCA
[CIVIL APPEAL NO: W-03-19-1998]
31 MARCH 2004

CIVIL PROCEDURE: *Striking out - Appeal against dismissal of striking out application - Appeal by second defendant in action - Whether there was a reasonable cause of action against him - Whether he acted in his official capacity as executive chairman of first defendant and therefore could not be held personally liable - Rules of the High Court 1980, O. 18 r. 19(1)*

This was an appeal by the appellant against the decision of the judge in chambers dismissing his application under O. 18 r. 19(1) of the Rules of the High Court 1980 ('RHC') to strike out the respondents' action against him. The respondents as plaintiffs commenced an action against a company called Wembley Industries Holdings Berhad ('Wembley') and the appellant who were the first and second defendants respectively. The appellant was the executive chairman of Wembley. The respondents alleged, *inter alia*, that Wembley via the appellant had made a demand on them to honour a profit guarantee after having given assurances and promises to them that it would not do so. The profit guarantee was purportedly made under a supplementary agreement ('SA') in furtherance of a development project. For the purposes of this appeal, as against the appellant, the respondents claimed damages for fraud, promissory estoppel and tort of inducement of breach of contract.

Held (allowing the appeal):
Per Abdul Kadir Sulaiman JCA

[1] In order to fix liability personally on the appellant there must be averments pointing to the personal action or inaction of the appellant in the course of his dealings with the respondents as distinct from his conduct as the executive chairman of Wembley. There was nothing in the pleadings to show that the allegations made against him were in his personal conduct. He conducted all matters alleged by the respondents in his official capacity as the executive chairman of Wembley. In the circumstances, he could not

be held personally liable. As such, the respondents' action against him in person disclosed no reasonable cause of action and was therefore fit to be struck out under O. 18 r. 19(1) RHC. (pp 509 g-h & 510 a-b)

Per Abdul Aziz Mohamad JCA

[1] For the appellant to be guilty of the tort of deceit, the respondents must in fact have acted in reliance on his assurances and promises. However, in the statement of claim the respondents did not state whether they did act, and in what manner, in reliance on his assurances and promises. Therefore, the statement of claim did not disclose a cause of action in deceit. As for estoppel, the respondents could not use it as a cause of action. (pp 512 c-f & 513 g)

[2] The terms of the SA enabled Wembley to claim from the respondents for any shortfall upon default on the profit guarantee. Wembley did make such a claim against the respondents when there was a shortfall. As such, making the claim was not in breach of the SA but on the contrary an act that enforced or gave effect to it. Therefore, there was no cause of action in the tort of inducement of breach of contract. (pp 513 h & 514 d-f)

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan perayu terhadap keputusan hakim dalam kamar menolak permohonannya di bawah A. 18 k. 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk membatal tindakan responden-responden terhadapnya. Responden-responden sebagai plaintif-plaintif telah membawa tindakan tersebut terhadap sebuah syarikat bernama Wembley Industries Holdings Berhad ('Wembley') dan juga terhadap perayu sebagai defenden pertama dan defendan kedua masing-masing di dalam tindakan tersebut. Perayu adalah pengerusi eksekutif Wembley. Responden-responden mendakwa, antara lain, bahawa Wembley melalui perayu telah membuat satu tuntutan terhadap mereka untuk menunaikan satu gerenti keuntungan selepas memberikan janjian dan jaminan bahawa ia tidak akan membuat demikian. Gerenti keuntungan tersebut didakwa dibuat di bawah satu perjanjian tambahan ('SA') bagi maksud satu projek pembangunan. Bagi tujuan rayuan ini, responden-responden menuntut terhadap perayu ganti rugi untuk tort perdayaan, estopel promisory dan tort mendorongkan kemungkiran kontrak.

Diputuskan (membenarkan rayuan):
Oleh Abdul Kadir Sulaiman HMR

[1] Bagi tujuan mengenakan liabiliti atas perayu, dakwaan-dakwaan mesti menunjukkan bahawa tindakannya atau ketiadaan tindakannya dalam urusan-urusan dengan responden-responden adalah secara peribadi dan bukan sebagai pengerusi eksekutif Wembley. Pliding-pliding tidak menunjukkan sedemikian. Tindakan-tindakan yang dibuatnya adalah dalam keupayaan rasminya sebagai pengerusi eksekutif Wembley. Maka, perayu tidak boleh dianggap bertanggungan sendiri. Berikutannya, tiada kausa tindakan terhadapnya dan dengan itu tindakan responden-responden terhadapnya patut dibatalkan di bawah A. 18 k. 19(1) KMT.

Per Abdul Aziz Mohamad HMR

[1] Untuk mendapati perayu bersalah di bawah tort perdayaan, responden-responden mestilah telah bertindak atas janjian dan jaminan yang diberikan oleh perayu. Tetapi pernyataan tuntutan responden-responden tidak menunjukkan bahawa mereka telah bertindak sedemikian. Dengan itu, pernyataan tuntutan tidak menunjukkan satu kausa tindakan untuk tort perdayaan. Bagi estopel pula, responden-responden tidak boleh mengunakannya sebagai satu kausa tindakan.

[2] Terma-terma SA membolehkan Wembley menuntut dari responden-responden apa-apa kekurangan yang timbul akibat keingkaran gerenti keuntungan tersebut. Wembley memang membuat tuntutan tersebut apabila terdapat kekurangan sedemikian. Dengan itu, Wembley tidak boleh dianggap kemungkiran SA tersebut tetapi secara kebetulan telah menguatkuasakannya atau memberikan kesan kepadanya. Maka, responden-responden tidak mempunyai satu kausa tindakan untuk tort mendorongkan kemungkiran kontrak.]

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Loh Bee Tuan v. Shing Yin Construction (Kota Kinabalu) Sdn Bhd & Ors [2002] 3 CLJ 39 HC ***(refd)***

Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 57(2)
Rules of the High Court 1980, O. 18 r. 19(1)

Other source(s) referred to:
Clerk and Lindsell on Torts, 17th edn, para 14-01

For the appellant - Lim Chor Pee (Ong Ming Suan); M/s Chor Pee Anwarul & Co
For the respondents - S Ramesh; M/s Adnan Sundra & Low

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D4-22-831-1997]

Reported by Usha Thiagarajah

JUDGMENT

Abdul Kadir Sulaiman JCA:

By a summons in chambers dated 29 October 1997, the appellant, who is the second defendant in Civil Suit No: D4-22-831-1997 ("the suit") applied *inter alia*, for the striking out of the writ and the statement of claim of the respondents against him pursuant to O. 18 r. 19(1)(a) of the Rules of the High Court 1980 ("RHC"). The learned senior assistant registrar ("the SAR") dismissed the said application with costs. Dissatisfied with the decision, the appellant appealed to the judge in chambers who on 25 March 1998 also dismissed the said appeal with costs. Against the dismissal, the appellant filed an appeal to the Court of Appeal. We heard the said appeal and on 10 March 2003 allowed the appeal of the appellant with costs here and below. We now provide our grounds for so doing.

Before the SAR and the learned judge, the appellant contended that as at the date of the issue of the writ by the respondents, the first defendant, Wembely Industries Holdings Berhad, had not instituted any action against them and therefore, the respondent would not have suffered any damage therefrom. Consequently, it would not have given rise to any cause of action against him by the suit. The learned judge disagreed and was of the view that it would not be a plain and obvious case for a summary decision under O. 18 r. 19 of the RHC to strike out the writ and the statement of claim of the respondents. Hence the dismissal of the appeal. The learned judge was of the view that the respondents had in fact been asked to make necessary payment upon the guarantee put up by them, thereby exposing the respondents to liability to make payment in the event of default. The circumstances, therefore, are sufficient for the respondents to call upon the appellant to honour the alleged assurance and representation given to the respondents that the respondents would not be called upon to perform the guarantee. The notice received by the respondents was sufficient catalyst for the respondents to institute an action against the appellant.

To understand the arguments, a glimpse of the important background leading to this suit is important. It concerns a project known as Plaza Rakyat Project ("the project") on a 14.2 acres of land in Pudu area of Kuala Lumpur conceived and to be undertaken by the respondents. Towards that end, Plaza Rakyat Sdn Bhd was incorporated by the respondents in 1990. On or about 15 October 1991, the respondents' entire shareholding in the company was transferred to Clifford Investments Limited ("CIL") in consideration for the issue of the entire paid up share capital of CIL to the respondents. Then on or about 19 October 1991 the respondent's entire shareholding in CIL was transferred to National Investment Company Limited ("NICL") in consideration for the issue of the entire paid up share capital of NICL to the respondents.

Upon the issuance of a Development Order by Dewan Bandaraya Kuala Lumpur approving the construction of the Project around November 1991, the respondents decided to transfer the ownership of Plaza Rakyat Sdn Bhd to a public company listed on Kuala Lumpur Stock Exchange in exchange for an issue of shares in the listed company so that funds can be raised by the public company to the respondents in order to facilitate the raising of finance needed to complete the construction of the project.

Then began the involvement of the respondents with the first defendant. By a Share Sale Agreement dated 4 December 1992, NICL agreed to sell its entire shareholding in CIL to the first defendant, Wembley Industries Holdings Berhad, for the price of RM160 million to be satisfied by the issue of 100 million new ordinary shares in the first defendant to NICL. The agreement was conditional upon the approval of the Securities Commission.

On or about July 1993, the first defendant made a formal application to the Securities Commission for the above purpose. This application contained a detailed plan for the development of the project which included, amongst other things, a comprehensive forecast ("the 1993 Forecast") of the anticipated profit before tax of the project for each year up to the scheduled completion of the project.

On 30 November 1993 the Securities Commission approved the Share Sale Agreement subject to the fulfillment of certain conditions by the vendors of CIL. *Inter alia*, NICL should warrant to the first defendant that the profit before tax of CIL for the years 1994 to 1996 would be not less then RM140 million based on the 1993 Forecast mentioned earlier. Further, the consideration for the sale of CIL would be revised to RM150 million to be satisfied by the issue of 60 million shares in the first defendant to NICL. To satisfy the requirement, a Supplemental Agreement dated 26 July 1994 was entered into by the parties. By this agreement, NICL warranted that:

(a) the profit before tax of CIL for the years 1994 would be RM10 million and for 1995 and 1996 would be RM65 million each ("Profit Guarantee").

(b) the first defendant would be entitled to claim from NICL any shortfall in the profits of CIL for those years warranted and the respondents would assume all the undertakings and obligations of NICL under the Share Sale Agreement, including those relating to the Profit Guarantee.

On 8 August 1994, the 60 million new ordinary shares of the first defendant were issued directly to the shareholders of NICL out of which the respondents were allotted 36 million shares representing 24.9% of the capital of the first defendant.

Up to now, the appellant was not in any way involved in the arrangement between NICL and the first defendant. It was only in or about July 1995 when a company known as Ekran Berhad ("Ekran") in which the appellant having controlling and substantial interest, came into the picture to acquire approximately 32.9% of the paid up capital of the first defendant. And on 28 July 1995 three nominees of Ekran of which the appellant was one, were appointed directors of the first defendant. A month later, on 28 August 1995 the appellant was appointed the Executive Chairman of the first defendant.

It was averred in the statement of claim of the respondents that immediately upon his appointment, the appellant through Ekran, and by virtue of his position as the Executive Chairman of the first defendant, assumed total and absolute control over all aspects of the project, resulting in the first defendant committing a breach of the term of the Supplemental Agreement leading to the inability to fulfil the Profit Guarantee. The appellant, the alter ego of the first defendant, since his appointment as Chairman of the Board of Directors of the first defendant, had on numerous occasions gave assurances and promises to the respondents with regards to his intentions and the intention of the first defendant not to call on the Profit Guarantee. So, by making a demand upon the respondents to honour the guarantee in April 1997, the first defendant attempted to renege on the said assurances and promises.

It was further averred that in consequence of the first defendant's breach of the terms of the agreement, the respondents lost control over the project and were unable to decide on the course taken towards completion of the project. Accordingly, the respondents also were unable to ensure that the implementation of the project adhered to the parameters and assumptions set out in the 1993 Forecast.

By way of alternative pleading, the respondents averred that, as a result of Ekran's acquisition of shares in the first defendant and as a result of the first defendant's assumption of control over the project, it became impossible for the respondents to ensure the profits set out in the 1993 Forecast were achieved. Hence, the Supplemental Agreement and the Profit Guarantee for the years 1995 and 1996 are frustrated or, alternatively, void pursuant to s. 57(2) of the Contracts Act. As such, the respondents are released from liability under the Profit Guarantee for the said years.

As against the first defendant, the respondents made various claims over matters stated earlier. As against the appellant, which is of concern to us in this appeal, the respondents in the suit claim:

(a) damages for fraud with respect to the appellant's False Intention Statements to the respondents that the Profit Guarantee would not be called upon;

(b) a declaration that the appellant is obliged to indemnify the respondents in respect of any loss which they may suffer pursuant to, or in relation to, the Profit Guarantee by virtue of the representations made by the appellant to the respondents that the Profit Guarantee would not be called upon, which gave rise to a promissory estoppel against the appellant or, alternatively, an order for payment in respect of any loss suffered by the respondents on the same grounds;

(c) damages for the tort on inducing a breach of the Supplemental Agreement;

(d) costs, interest and such other reliefs as the court deems fit.

My learned brother, Mokhtar Hj. Sidin, JCA associates himself with me in writing this grounds of decision whilst my learned brother, Abdul Aziz Mohamad JCA has been kind enough to render a separate decision on the matter.

As disclosed in the pleadings of the respondent in the suit as a whole, we are of the view that in order to fix the liability personally on the appellant there must be averments pointing to the personal action or inaction of the appellant in the course of his dealings with the respondents as distinct from his conduct as the Executive Chairman of the first defendant. We are here not concern with the dispute between the respondents and the first defendant but merely as to the dispute between the respondents and the appellant who was being sued in his personal capacity as the second defendant, as distinct from his position as the Executive Chairman of the first defendant after he came into the picture on 28 August 1995 upon Ekran Berhad, wherein the appellant having a controlling or substantial interest in it, acquiring approximately 32.9% of the paid up capital of the first defendant in or about July 1995. Regret to say

that nothing was in the pleadings to show that whatever allegation made against the appellant was in respect of his personal conduct. All matters were taken up by the appellant in his official capacity as the Executive Chairman of the first appellant. As a chief executive of the first defendant, whatever is said or done by him in that capacity must be that of the first defendant. Hence, on this ground alone we find that there is every basis in the application of the appellant in the High Court to apply for the striking out of the writ and the pleadings against him in the suit under O.18 r. 19 of the RHC. The learned counsel for the respondent in his written submission in this appeal before us, lists out the statement of agreed facts of which items 6, 7 and 8 are of utmost importance in deciding the fate of this appeal. They are:

(i) the issue of the Profit Guarantee was the subject of several discussions between the respondents and the appellant;

(ii) that the Board of Directors during a board meeting decided to call upon the Profit Guarantee for the financial years 1994, 1995 and 1996; and

(iii) that a demand was made by the first defendant on the respondents for the profits under the Profit Guarantee.

On item (i) above, short of a clear indicator that the several discussions had between the respondents and the appellant were discussions over which the appellant acted in his personal capacity, the discussions if at all held by him must be that in his capacity representing the first defendant, or else for what reason must the appellant had a personal interest in the matter. A limited company as a legal entity is being represented by its proper human agent in all its dealings with third parties for which the company must except full responsibility, if any. So, in this regard, the appellant cannot as distinct from the company which he represents be held personally liable to the third parties for so acting.

Items (ii) and (iii) above speak for itself in that on the averment, it was the first defendant through its Board of Directors which decided to call upon the Profit Guarantee and to issue a demand on the matter. In such circumstance, the appellant in his personal capacity cannot singly be held responsible for that.

So, for the reasons given above, on the pleadings of the respondents, we are of the view that the action against the appellant in person discloses no reasonable cause of action against him and is a fit case for the granting of the application of the appellant under O. 18 r. 19 of the RHC. Accordingly, this appeal had to be allowed with costs here and below. We accordingly made an order that the writ and the statement of claim dated 2 October 1997 as it affects the appellant be struck out.

Abdul Aziz Mohamad JCA:

In the appeal before us the appellant succeeded in his attempt to have the respondents' writ and statement of claim against him struck out under O. 18 r. 19(1)(a) on the ground that they disclosed no reasonable cause of action. We allowed the appeal, finding, on the assumption that the averments in the statement of claim were true, that the writ and statement of claim disclosed no reasonable cause of action against the appellant.

My learned brother Dato' Abdul Kadir has set out in his grounds of judgment the events, as he saw disclosed in the statement of claim, leading to the respondents' action against the appellant as the second defendant and Wembley Industries Holdings Berhad ("Wembley") as the first defendant. To state my reasons for finding that the statement of claim disclosed no reasonable cause of action against the appellant, it is necessary to state only the following basic facts as averred in the statement of claim. By a sale and purchase agreement dated 4 December 1992 ("the Share Sale Agreement"), NICL agreed to sell its entire shareholding in CIL to Wembley. On 26 July 1994 Wembley, NICL and the respondents entered into a Supplementary Agreement by which NICL gave Wembley a warranty (a) that the profit before tax of CIL for the years 1994, 1995 and 1996 would be of such and such amounts ("the Profit Guarantee"), (b) that Wembley would be entitled to claim from NICL any shortfall in CIL's profit for those years, and (c) that the respondents would assume all the undertakings of NICL under the Share Sale Agreement and under the Profit Guarantee. On 28 August 1995 the appellant became the Executive Chairman of Wembley and since then, according to para. 63 of the statement of claim, "had on numerous occasions given assurances and promises to the (respondents) with regards to his intentions and the intention of (Wembley) not to call on the Profit Guarantee", but on 21 August 1997 Wembley demanded from the respondents a sum of RM129,666,403 under the Profit Guarantee.

In submission before us the respondents' counsel contended that the statement of claim disclosed three causes of action.

Tort Of Deceit

For the tort of deceit the respondents, in prayer (b)(i) in the statement of claim, claimed damages. This tort was pleaded in paras. 63 to 66 of the statement of claim. For the law, the respondents relied on the following passage about the tort from *Clerk and Lindsell on Torts* (17th edn. para 14-01) as quoted in *Loh Bee Tuan v. Shing Yin Construction (Kota Kinabalu) Sdn Bhd & Ors* [2002] 3 CLJ 39 at p. 49:

> The tort involves a false representation made by the defendant, who knows it to be untrue, or who has no belief in its truth, or who is reckless as to its truth. If the defendant intended that the plaintiff should act in reliance on such a representation and the plaintiff in fact does so, the defendant will be liable in deceit for the damage caused.

In para. 65 of the statement of claim the respondents averred that the assurances and promises about the Profit Guarantee given by the appellant, said to be the alter ego of Wembley (para. 63), were false because Wembley and the appellant had always intended to make a claim on the Profit Guarantee. In para. 66 the respondents claimed that they had suffered loss and damage as a result of the "fraud".

According to the passage earlier cited, for the appellant to be guilty of the tort of deceit the respondents must in fact have acted in reliance on the appellant's assurances and promises. In his oral submission, the appellant's counsel argued that the statement of claim did not disclose a tort of deceit because it did not state that the respondents did act, and in what manner, in reliance on the appellant's assurances and promises. That was true because para. 64 merely said that the appellant's assurances and promises "were relied upon by the (respondents) and taken as the truth …". The respondents' counsel replied that the respondents' actions in reliance on the appellant's assurances and promises were set out in para. 68, but the appellant's counsel pointed out that para. 68 was pleaded in support of the respondents' case for a cause of action on estoppel and not in support of the cause of action in deceit. That was true. As the statement of claim stood, para. 68, which came under the case for estoppel, was not linked by words to para. 64 which came under the case for deceit, or *vice versa*. For that reason I agreed that the statement of claim did not disclose a cause of action in deceit.

Promissory Estoppel

Relying on promissory estoppel the respondents, in prayer (b)(ii), sought a declaration that the appellant was obliged to indemnify them for any loss which they may suffer on account of the Profit Guarantee. The case for promissory estoppel was pleaded in paras. 67 to 73. The case for promissory estoppel also hinged on the appellant's assurances and promises about the Profit Guarantee. Paragraph 71 said that the respondents relied on the appellant's assurances and promises by conducting themselves in the manner set out in para. 68, which did set out the manner in which the respondents acted in reliance on the assurances and promises.

The appellant's counsel argued that estoppel could only be used as a shield should Wembley sue the respondents on the Profit Guarantee and not as a sword to enable the respondents to sue the appellant, yet here they were suing the appellant in reliance on the promissory estoppel for a declaration that the appellant was obliged to indemnify the respondents. The respondents' counsel argued that estoppel may be used as a sword and not only as a shield. He relied on *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283. Several passages from the judgment of the Federal Court that was delivered by Gopal Sri Ram JCA were referred to in the respondents' skeletal submission but I thought that the really pertinent passage on this question of sword and shield was this one at p. 295:

> We would add that it is wrong to apply the maxim 'estoppel may be used as a shield but not a sword' as limiting the availability of the doctrine to defendants alone. Plaintiffs too may have recourse to it. The true nature of the doctrine in this context is that stated by Lord Russell of Killowen in *Dawsons Bank v. Nippon Menkwa Kabushiki Kaisha* LR 62 IA 100 at p. 108.

Gopal Sri Ram JCA was speaking of the nature of the doctrine of estoppel "in this context", that is in the context of the question of its utility as a sword or a shield. When he said that "the plaintiffs too may have recourse to it", he meant recourse as explained by Lord Russell of Killowen in the following words that he quoted:

> Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action.

The recourse that estoppel may be had by a plaintiff is as a help to maintain the plaintiff's cause of action. The plaintiff must first have a cause of action which is not founded on the estoppel because estoppel is not a cause of action. In the present case the respondents were using estoppel as a basis for suing the appellant for a declaration that the appellant was obliged to indemnify them. They were using estoppel as a cause of action which, in my judgment, they could not do.

Tort Of Inducement Of Breach Of Contract

The contract that the respondents claimed that the appellant induced the breach of was the Supplementary Agreement. For the tort, the respondents, in prayer (b)(iii) in the statement of claim, sought damages. I have set out the terms comprised in the Supplementary Agreement. They would enable Wembley to claim for any shortfall should NICL default on the Profit Guarantee given by

NICL to Wembley, and to claim it from the respondents. As I have stated, Wembley did make a claim against the respondents on the Profit Guarantee on the basis that there had been a shortfall.

In his oral submission, the appellant's counsel said that the tort of inducement of breach of contract was an unusual one. In his reply the respondents' counsel stated that he believed that the court would not be with him on the question of the cause of action for this tort. He then cited *Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105 for the statement as to the ingredients of the tort at p. 108 B-F (right). One of the ingredients is that there must be direct or indirect interference by a third person in the execution of a valid contract between two or more other parties, the interference taking the form not only of actual procurement or inducement of the breach of the contract, but even of preventing or hindering one party from performing his duties under the contract. In reply to that the appellant's counsel questioned what the promise was in the Supplementary Agreement the performance of which had been hindered or prevented, or that had been broken, by whatever the appellant might have done. He asked the question because all that had happened pursuant to the Supplementary Agreement was the claim made by Wembley for the shortfall, and making the claim would not be a breach of the Supplementary Agreement. On the contrary, it was an act of enforcing or giving effect to the Supplementary Agreement.

The submission of the appellant's counsel was perfectly sound as it stood. For that reason, and in view of the belief that the respondents' counsel had expressed that the court would not be with him, which I took to imply as an admission by the respondents that the statement of claim did not disclose a cause of action in the tort of inducement of breach of contract, I decided that the statement of claim did not disclose such a cause of action. It was a decision made on an assessment of the oral submissions as they went, and not upon an actual perusal of the statement of claim.

Upon perusing the statement of claim in order to prepare these grounds of judgment, however, I am bound to state with regret that the oral submission before us did not take into account the fact that for this cause of action, which was set out in paras. 74 to 77 of the statement of claim, the respondents relied on their contention in para. 38 that the Supplementary Agreement carried certain implied terms, and the fact that it was those implied terms that the respondents claimed Wembley had breached as a direct or indirect result of certain actions

on the part of the appellant. The burden of the implied terms in para. 38 was that Wembley would assist in ensuring that the profit of CIL would meet the targets set out in the Profit Guarantee and would not do anything that would prevent or hinder the achievement of the targets. The particulars of the breaches of the implied terms were set out in paras. 41 to 60.